9035 (*i.e.*, Form ETA 9035CP) should not be FAXed with the Form ETA 9035.

(b) *U.S. Mail.* If the employer submits the LCA (Form ETA 9035) by U.S. Mail, the LCA shall be sent to the ETA service center at the following address: ETA Application Processing Center, P.O. Box 13640, Philadelphia PA 19101.

(c) *All matters other than the processing of LCAs* (*e.g.*, prevailing wage challenges by employers) are within the jurisdiction of the Regional Certifying Officers in the ETA regional offices identified in § 655.721.

[65 FR 80212, Dec. 20, 2000]

§ 655.721 What are the addresses of the ETA regional offices which handle matters other than processing LCAs?

(a) The Regional Certifying Officers in the ETA regional offices are responsible for administrative matters under this subpart other than the processing of LCAs (*e.g.*, prevailing wage challenges by employers). (Note to paragraph (a): LCAs are filed by employers and processed by ETA only in accordance with § 655.720.)

(b) The ETA regional offices with responsibility for labor certification programs are—

(1) Region I Boston (Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont): J.F.K. Federal Building, Room E–350, Boston, Massachusetts 02203. Telephone: 617–565–4446.

(2) Region I New York (New York, New Jersey, Puerto Rico, and the Virgin Islands): 201 Varick Street, Room 755, New York, New York 10014. Telephone: 212–337–2186.

(3) Region II (Delaware, District of Columbia, Maryland, Pennsylvania, Virginia, and West Virginia): Suite 825 East, The Curtis Center, 170 S. Independence Mall West, Philadelphia, Pennsylvania 19106–3315. Telephone: 215–861–5250.

(4) Region III (Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, and Tennessee): Atlanta Federal Ctr., 100 Alabama St., NW, Suite 6M–12, Atlanta, Georgia 30303. Telephone: 404–562–2115.

(5) Region IV (Arkansas, Colorado, Louisiana, Montana, New Mexico, North Dakota, Oklahoma, South Dakota, Texas, Utah, and Wyoming): 525 Griffin Street, Room 317, Dallas, Texas 75202. Telephone: 214–767–4989.

(6) Region V (Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Nebraska, Ohio, and Wisconsin): 230 South Dearborn Street, Room 605, Chicago, Illinois 60604. Telephone: 312–353–1550.

(7) Region VI (Alaska, Arizona, California, Guam, Hawaii, Idaho, Nevada, Oregon, and Washington): P.O. Box 193767, San Francisco, California 94119–3767. Telephone: 415–975–4601.

(c) The ETA website at *http://ows.doleta.gov* will be updated to reflect any changes in the information contained in this section concerning the ETA regional offices.

[65 FR 80212, Dec. 20, 2000]

§ 655.730 What is the process for filing a labor condition application?

(a) *Who must submit labor condition applications?* An employer, or the employer's authorized agent or representative, which meets the definition of ''employer'' set forth in § 655.715 and intends to employ an H–1B nonimmigrant in a specialty occupation or as a fashion model of distinguished merit and ability shall submit an LCA to the Department.

(b) *Where and when is an LCA to be submitted?* An LCA shall be submitted by the employer to ETA in accordance with the procedure prescribed in § 655.720 no earlier than six months before the beginning date of the period of intended employment shown on the LCA. It is the employer's responsibility to ensure that a complete and accurate LCA is received by ETA. Incomplete or obviously inaccurate LCAs will not be certified by ETA. ETA shall process all LCAs sequentially upon receipt regardless of the method used by the employer to submit the LCA (*i.e.*, either FAX or U.S. Mail as prescribed in § 655.720) and shall make a determination to certify or not certify the LCA within seven working days of the date the LCA is received and date stamped by ETA. If the LCA is submitted by FAX, the LCA containing the original signature shall be maintained by the employer as set forth at § 655.760(a)(1).

(c) *What is to be submitted?* Form ETA 9035.

(1) *General.* One completed and dated original Form ETA 9035 bearing the employer's original signature (or that of the employer's authorized agent or representative) shall be submitted by the employer to ETA in accordance with the procedure prescribed in § 655.720. The signature of the employer or its authorized agent or representative on Form ETA 9035 acknowledges the employer's agreement to the labor condition statements (attestations), which are specifically identified in Form ETA 9035 as well as set forth in the cover pages (Form ETA 9035CP) and incorporated by reference in Form ETA 9035. The labor condition statements (attestations) are described in detail in §§ 655.731 through 655.735, and 655.736 through 655.739 (if applicable). Copies of Form ETA 9035 and cover pages Form ETA 9035CP are available from ETA regional offices and on the ETA website at *http://ows.doleta.gov*. Each Form ETA 9035 shall identify the occupational classification for which the LCA is being submitted and shall state:

(i) The occupation, by Dictionary of Occupational Titles (DOT) Three-Digit Occupational Groups code and by the employer's own title for the job;

(ii) The number of H–1B nonimmigrants sought;

(iii) The gross wage rate to be paid to each H–1B nonimmigrant, expressed on an hourly, weekly, biweekly, monthly or annual basis;

(iv) The starting and ending dates of the H–1B nonimmigrants' employment;

(v) The place(s) of intended employment;

(vi) The prevailing wage for the occupation in the area of intended employment and the specific source (*e.g.*, name of published survey) relied upon by the employer to determine the wage. If the wage is obtained from a SESA, the appropriate box must be checked and the wage must be stated; the source for a wage obtained from a source other than a SESA must be identified along with the wage; and

(vii) The employer's status as to whether or not the employer is H–1B-dependent and/or a willful violator, and, if the employer is H–1B-dependent and/or a willful violator, whether the employer will use the application only in support of petitions for exempt H–1B nonimmigrants.

(2) *Multiple positions and/or places of employment.* The employer shall file a separate LCA for each occupation in which the employer intends to employ one or more H–1B nonimmigrants, but the LCA may cover more than one intended position (employment opportunity) within that occupation. All intended places of employment shall be identified on the LCA; the employer may file one or more additional LCAs to identify additional places of employment.

(3) *Full-time and part-time jobs.* The position(s) covered by the LCA may be either full-time or part-time; full-time and part-time positions cannot be combined on a single LCA.

(d) *What attestations does the LCA contain?* An employer's LCA shall contain the labor condition statements referenced in §§ 655.731 through 655.734, and § 655.736 through 655.739 (if applicable), which provide that no individual may be admitted or provided status as an H–1B nonimmigrant in an occupational classification unless the employer has filed with the Secretary an application stating that:

(1) The employer is offering and will offer during the period of authorized employment to H–1B nonimmigrants no less than the greater of the following wages (such offer to include benefits and eligibility for benefits provided as compensation for services, which are to be offered to the nonimmigrants on the same basis and in accordance with the same criteria as the employer offers such benefits to U.S. workers):

(i) The actual wage paid to the employer's other employees at the worksite with similar experience and qualifications for the specific employment in question; or

(ii) The prevailing wage level for the occupational classification in the area of intended employment;

(2) The employer will provide working conditions for such nonimmigrants that will not adversely affect the working conditions of workers similarly employed (including benefits in the nature of working conditions, which are to be offered to the nonimmigrants on the same basis and in accordance with the

same criteria as the employer offers such benefits to U.S. workers);

(3) There is not a strike or lockout in the course of a labor dispute in the occupational classification at the place of employment;

(4) The employer has provided and will provide notice of the filing of the labor condition application to:

(i)(A) The bargaining representative of the employer's employees in the occupational classification in the area of intended employment for which the H–1B nonimmigrants are sought, in the manner described in § 655.734(a)(1)(i); or

(B) If there is no such bargaining representative, affected workers by providing electronic notice of the filing of the LCA or by posting notice in conspicuous locations at the place(s) of employment, in the manner described in § 655.734(a)(1)(ii); and

(ii) H–1B nonimmigrants by providing a copy of the LCA to each H–1B nonimmigrant at the time that such nonimmigrant actually reports to work, in the manner described in § 655.734(a)(2).

(5) The employer has determined its status concerning H–1B-dependency and/or willful violator (as described in § 655.736), has indicated such status, and if either such status is applicable to the employer, has indicated whether the LCA will be used only for exempt H–1B nonimmigrant(s), as described in § 655.737.

(6) The employer has provided the information about the occupation required in paragraph (c) of this section.

(e) *Change in employer's corporate structure or identity.* (1) Where an employer corporation changes its corporate structure as the result of an acquisition, merger, ''spin-off,'' or other such action, the new employing entity is not required to file new LCAs and H–1B petitions with respect to the H–1B nonimmigrants transferred to the employ of the new employing entity (regardless of whether there is a change in the Employer Identification Number (EIN)), *provided that* the new employing entity maintains in its records a list of the H–1B nonimmigrants transferred to the employ of the new employing entity, and maintains in the public access file(s) (see § 655.760) a document containing all of the following:

(i) Each affected LCA number and its date of certification;

(ii) A description of the new employing entity's actual wage system applicable to H–1B nonimmigrant(s) who become employees of the new employing entity;

(iii) The employer identification number (EIN) of the new employing entity (whether or not different from that of the predecessor entity); and

(iv) A sworn statement by an authorized representative of the new employing entity expressly acknowledging such entity's assumption of all obligations, liabilities and undertakings arising from or under attestations made in each certified and still effective LCA filed by the predecessor entity. Unless such statement is executed and made available in accordance with this paragraph, the new employing entity shall not employ any of the predecessor entity's H–1B nonimmigrants without filing new LCAs and petitions for such nonimmigrants. The new employing entity's statement shall include such entity's explicit agreement to:

(A) Abide by the DOL's H–1B regulations applicable to the LCAs;

(B) Maintain a copy of the statement in the public access file (see § 655.760); and

(C) Make the document available to any member of the public or the Department upon request.

(2) Notwithstanding the provisions of paragraph (e)(1) of this section, the new employing entity must file new LCA(s) and H–1B petition(s) when it hires any new H–1B nonimmigrant(s) or seeks extension(s) of H–1B status for existing H–1B nonimmigrant(s). In other words, the new employing entity may not utilize the predecessor entity's LCA(s) to support the hiring or extension of any H–1B nonimmigrant after the change in corporate structure.

(3) A change in an employer's H–1B-dependency status which results from the change in the corporate structure has no effect on the employer's obligations with respect to its current H–1B nonimmigrant employees. However, the new employing entity shall comply with § 655.736 concerning H–1B-dependency and/or willful-violator status and

§ 655.737 concerning exempt H–1B nonimmigrants, in the event that such entity seeks to hire new H–1B nonimmigrant(s) or to extend the H–1B status of existing H–1B nonimmigrants. (See § 655.736(d)(6).)

[65 FR 80212, Dec. 20, 2000]

§ 655.731 What is the first LCA requirement, regarding wages?

An employer seeking to employ H–1B nonimmigrants in a specialty occupation or as a fashion model of distinguished merit and ability shall state on Form ETA 9035 that it will pay the H–1B nonimmigrant the required wage rate.

(a) *Establishing the wage requirement.* The first LCA requirement shall be satisfied when the employer signs Form ETA 9035 attesting that, for the entire period of authorized employment, the required wage rate will be paid to the H–1B nonimmigrant(s); that is, that the wage shall be the greater of the actual wage rate (as specified in paragraph (a)(1) of this section) or the prevailing wage (as specified in paragraph (a)(2) of this section). The wage requirement includes the employer's obligation to offer benefits and eligibility for benefits provided as compensation for services to H–1B nonimmigrants on the same basis, and in accordance with the same criteria, as the employer offers to U.S. workers.

(1) The *actual wage* is the wage rate paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question. In determining such wage level, the following factors may be considered: Experience, qualifications, education, job responsibility and function, specialized knowledge, and other legitimate business factors. ''Legitimate business factors,'' for purposes of this section, means those that it is reasonable to conclude are necessary because they conform to recognized principles or can be demonstrated by accepted rules and standards. Where there are other employees with substantially similar experience and qualifications in the specific employment in question—*i.e.,* they have substantially the same duties and responsibilities as the H–1B nonimmigrant—the actual wage shall be the amount paid to these other employees. Where no such other employees exist at the place of employment, the actual wage shall be the wage paid to the H–1B nonimmigrant by the employer. Where the employer's pay system or scale provides for adjustments during the period of the LCA—*e.g.,* cost of living increases or other periodic adjustments, or the employee moves to a more advanced level in the same occupation—such adjustments shall be provided to similarly employed H–1B nonimmigrants (unless the prevailing wage is higher than the actual wage).

(2) The *prevailing wage* for the occupational classification in the area of intended employment must be determined as of the time of filing the application. The employer shall base the prevailing wage on the best information as of the time of filing the application. Except as provided in paragraph (a)(3) of this section, the employer is not required to use any specific methodology to determine the prevailing wage and may utilize a SESA, an independent authoritative source, or other legitimate sources of data. One of the following sources shall be used to establish the prevailing wage:

(i) A wage determination for the occupation and area issued under one of the following statutes (which shall be available through the SESA):

(A) The Davis-Bacon Act, 40 U.S.C. 276a *et seq.* (see also 29 CFR part 1), or

(B) The McNamara-O'Hara Service Contract Act, 41 U.S.C. 351 *et seq.* (SCA) (see also 29 CFR part 4). The following provisions apply to the use of the SCA wage rate as the prevailing wage:

(*1*) Where an SCA wage determination for an occupational classification in the computer industry states a rate of $27.63, that rate will not be issued by the SESA and may not be used by the employer as the prevailing wage; that rate does not represent the actual prevailing wage but, instead, is reported by the Wage and Hour Division in the SCA determination merely as an artificial ''cap'' in the SCA-required wage that results from an SCA exemption provision (see 41 U.S.C. 357(b); 29 CFR 541.3). In such circumstances, the SESA and the employer must consult another